FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1427

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Petitioners,

—v.—

CARL BEAZER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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INDEX

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I.

The Equal Protection Issue.

Respondents have attempted to cast the constitutional issue in terms of the asserted reasonableness of the employment standards imposed on the Transit Authority by the District Court's order. (Respondents' Brief, pp. 1, 100-101)

Of course, the issue in this case is not whether the employment standards imposed by the District Court are reasonable, but whether there is a rational basis for the Transit Authority's exclusion of methadone maintained patients from employment. If, as the Transit Authority con-

tends, that policy has a rational basis, then the District Court was obliged to make a finding of constitutionality and could not impose its own view of reasonable standards on the Authority.

Although respondents attempt to minimize the evidence in the record as to the deficiencies of methadone maintenance as a treatment for heroin addiction, and the problems involved in determining the employability of methadone patients, the fact is that that evidence is a consistent thread running through the testimony of the medical experts who testified at the trial. (Drs. Dole, DuPont, Gollance, Higgins, Joseph, Lowinson, Lukoff, Primm, Redner, Rosenberg, and Trigg.) Despite the fact that most of these experts were proponents of methadone maintenance programs and would be expected to portray the programs in the most favorable light, they were constrained to admit to the uncertainties and limitations of this form of treatment for heroin addiction. The District Court's failure to give adequate consideration to their testimony in this regard was based on the court's misapprehension of the constitutional standard applicable to this case. (Petitioners' Brief, pp. 39-41)

In connection with the problems involved in determining the employability of methadone users, the District Court's misapprehension of the constitutional standard was compounded by the court's failure to consider relevant portions of the federal confidentiality regulation. The court took note only of the section of the federal regulation authorizing methadone clinics to release certain information upon the consent of the patient. (Petition for Certiorari, pp. 50a-51a) The court did not even mention the section of the federal regulation which provides that even where the patient's consent is obtained, the clinic's disclosure to the employer "should be limited to a verification of the patient's

status in treatment or a general evaluation of progress in treatment," and that more specific information may be given only if the employer makes a commitment that such information will not adversely affect the patient's employment. An employer unwilling to make such a commitment would have to rely on meager conclusory statements by clinic personnel and would be unable to obtain specific supportive data. (42 CFR § 2.38(c)(d); Petitioners' Brief, pp. 25-26)

Respondents would have this Court believe that recent experience with methadone programs has obviated the "medical and scientific uncertainties" which concern the Transit Authority and which were recognized by this Court in *Marshall* v. *U. S.*, 414 U.S. 417, 427. (Respondents' Brief, p. 98, fn. 66) In fact, as shown by the American Public Transit Association in its amicus brief (at pp. 8-12), recent studies show that methadone programs have failed to live up to the expectations of their early proponents, and that the rehabilitation of drug addicts remains an inexact science. (See also, Petitioners' Brief, footnote at pp. 15-16)

Respondents apparently would require the Transit Authority to give the same individualized consideration to methadone users that it gives to diabetics, epileptics and persons with heart ailments. (Respondents' Brief, pp. 30-32) Unlike persons suffering from heart conditions, diabetes, or epilepsy, all of which are specific ailments giving rise to specific physical limitations which may be relevant to one job but not to another, methadone users generate legitimate concern as to stability and reliability, qualities which are basic to any and all job categories. As for the Transit Authority's policy regarding the employment of alcoholics, the analysis in the Authority's brief (at pp. 26-28) and indeed in respondents' brief as well (at p. 30),

demonstrates that this policy involves simply the giving of a limited second chance to employees with at least three years of service. No principle of constitutional law requires the Authority to take the same approach with respect to methadone users.

II.

The Title VII Issue.

A. *The Statistical Evidence*

The Transit Authority's main brief (at pp. 48-53) demonstrated the irrelevance of the statistics upon which the District Court based its finding of disparate impact, and the District Court's refusal to consider the evidence introduced into the record by the Authority showing that 46% of the Authority's employees are Black and Hispanic, and that these minority groups are employed throughout the Authority in all job categories.

Respondents (at p. 111 of their brief) cite *Furnco Construction Corp.* v. *Waters,* —— U.S. ——, 98 Sup. Ct. 2943, 2951 (1978) for the proposition that the Transit Authority's workforce statistics are irrelevant to the issue of whether there has been a Title VII violation in this case. Respondents' reliance on *Furnco* is misplaced. *Furnco* involved charges of disparate treatment rather than disparate impact, and consequently dealt with substantially different elements of proof from those involved in the instant case.

In a case such as the case at bar, in which the charge is disparate impact, where there is no question of disparate treatment, and no history of past discrimination, and where the plaintiff must show that the facially neutral

standards in question "select applicants for hire in a significantly discriminatory pattern", *Dothard* v. *Rawlinson,* 433 U.S. 321, 329, the employer's workforce statistics are of major significance. In the disparate impact cases which this Court has considered, the very first observation made by the Court was that there was a significant absence of minorities from the particular employer's workforce. *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 427 (1971); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 409 (1975); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329 (1977). See also *Townsend* v. *Nassau County Medical Center,* 558 F. 2d 117, 120 (2nd Cir. 1977).

This same approach is reflected in the "bottom line" provision of the new Uniform Guidelines on Employee Selection Procedure, 29 CFR § 1607.4, adopted in August 1978, as well as in the former EEOC Employment Selection Guidelines which provided (in 29 CFR § 1607.13) that selection techniques other than tests might be considered discriminatory if "there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs."

This case is completely devoid of any evidence of differential rates of applicant rejection or disproportionate representation of minorities in the Transit Authority's workforce. On the contrary, the record shows that in a metropolitan area in which the civilian workforce is 15% Black and 5% Hispanic, 46% of the Transit Authority's employees are Black and Hispanic, 39% of its newly hired employees are Black and Hispanic, and these minority

groups are employed throughout the Authority in all job categories. (Petitioners' Brief, pp. 52-53, and Def. Ex. P)

B. *The Necessity for Proof of Intent*

Respondents assert (at pp. 115-125 of their brief) that the 1972 amendment extending the coverage of Title VII to state and local government employment was based on both the Fourteenth Amendment and the Commerce Clause, and that Title VII can be applied to state and local government employment despite the absence of discriminatory intent.

In *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 452-453 and fn. 9 (1976), this Court cited the legislative history of the 1972 amendment and expressly noted that the amendment derived from Section 5 of the Fourteenth Amendment.

The Transit Authority's main brief (at pp. 46-48) urges that to the extent that Title VII asserts jurisdiction over the employment practices of government employers, it must be construed in accordance with the constitutional test enunciated in *Washington* v. *Davis,* 426 U.S. 229 (1976), i.e., there must be proof of discriminatory purpose.

The legislative history of the 1972 amendment to Title VII shows that Congress's concern was with overt and intentional discrimination by state and local government employers. Both the Senate and House Committee Reports (S. Rep. No. 92-415 (1971); H.R. Rep. No. 92-238 (1971)) relied upon a 1969 report of the U. S. Commission on Civil Rights which, as quoted in the House Report, had concluded that:

> "The basic finding of this report is that State and local governments have failed to fulfill their obligation to assure equal job opportunity. . . . Not only do State and local governments consciously and overtly discriminate in hiring and promoting minority group members, but they do not foster positive programs to deal with discriminatory treatment on the job." (1972 U.S. Code Cong. & Ad. News (92nd Congress, Second Session, 2153))

That Congress had no intention of imposing responsibilities on State and local government beyond the responsibilities imposed by the Fourteenth Amendment is demonstrated by its statement that:

> "Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the Civil Rights Act of 1871, 42 U.S.C. § 1983." (1972 U.S. Code Cong. & Ad. News (92nd Congress, Second Session, 2154))

Thus, Congress viewed the 1972 amendment as establishing an administrative remedy for state and local employees for the types of discrimination prohibited by the Fourteenth Amendment.

Congress was fully aware of this Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) and quoted extensively from *Griggs* in its consideration of employment tests. But there is no indication whatever in the legislative history of the 1972 amendment of any intention by Congress to extend the *Griggs* concept beyond the area of employment tests into the area of employment standards of the type under consideration in the case at bar. (1972 U.S. Code Cong. & Ad. News (92nd Congress, Second Session, 2155-2157))

Furthermore, Congress does not have unlimited power to decide for itself what public agency actions are or are not violations of the Fourteenth Amendment. Even in the expansive view of Congressional power under Section 5 of the Fourteenth Amendment expressed in *Katzenbach* v. *Morgan,* 384 U.S. 641 (1966), the Congressional enactment there under consideration was sustained largely on the ground that it was designed to override state laws which were in fact used for purposes of invidious discrimination prohibited by the Fourteenth Amendment, 384 U.S. at 653-656. In *Oregon* v. *Mitchell,* 400 U.S. 112, 295-296 (1970), Mr. Justice STEWART, in an opinion concurred in by Chief Justice BURGER and Mr. Justice BLACKMUN, observed that while *Morgan* had affirmed the power of Congress to "provide the means of eradicating situations that amount to a violation of the Equal Protection Clause," Congress does not have the power "to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause." 400 U.S. at p. 296.

As indicated in the Transit Authority's main brief (at pp. 46-47), coverage of state and local government employment under Title VII was not, and indeed could not have been based on the Commerce Clause. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) precludes federal interference under the Commerce Clause with freedom of government agencies in areas regarded as integral parts of their governmental functions. Determination of the qualifications of prospective employees is an indisputable attribute of state sovereignty and therefore beyond the reach of federal regulation under the Commerce Clause.

III.

The Newly Enacted Amendment to the Rehabilitation Act of 1973.

In their brief in opposition to the petition for certiorari, respondents argued vigorously and at some length (at pp. 26-28 and A1-A6) that this Court should deny the petition on the ground that the Rehabilitation Act of 1973 and the federal regulations promulgated thereunder mooted the constitutional issues posed in the petition. In granting the petition, the Court obviously rejected that argument.

Point I of respondents' brief on the merits renews the identical argument, this time on the basis of a newly enacted amendment to the Rehabilitation Act.

The case at bar involves vastly different considerations from the cases cited by respondents (at pp. 69-70 of their brief) in which this Court dismissed writs of certiorari as improvidently granted. Those cases presented extraordinary combinations of circumstances, including repeal of the statute upon which the litigation was based, new legislation disposing of the issues in the litigation, abandonment by the petitioners of their initial claim for relief, and the absence of more than a handful of persons who would be affected by any decision the Court might render. *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955); *Triangle Improvement Council* v. *Ritchie,* 402 U.S. 497 (1971).

The new amendment to the Rehabilitation Act was passed by the Congress on October 14, 1978, and according to a report in the New York Times, was signed by the President on November 6, 1978. It does not in express terms cover

methadone maintenance patients, and any attempt to interpret it so as to require the employment of such persons is certain to provoke litigation as to its scope and validity.

The new legislation is irrelevant to the important issues raised in the instant case under the Constitution and Title VII, which affect not only the parties to this suit, but other parties involved in similar litigation. (See *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978))

Respondents' request that this Court reverse its grant of certiorari on the basis of the new legislation is, in effect, a request for an interpretation of the legislation, and for retroactive application of its provisions to this case.

If this Court were to dismiss this case on the basis of the new legislation, such action would constitute compelling precedent in future litigation challenging the scope and validity of the new legislation. Determination of those questions should await the development of a full record in a proper case.

CONCLUSION

For the reasons stated above, as well as those stated in petitioners' main brief, petitioners pray that the judgment of the Courts below should be reversed and the complaint should be dismissed.

Respectfully submitted,

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